The Name Is Bond, Corporate Bond: Remedies for Breach of Bond Indentures After the Alarming *Cash America* Ruling

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ABSTRACT: The corporate bond market has historically been one of the most highly invested capital markets in the world. A recent case has disrupted the corporate bond market by granting an untraditional remedy. This Note first discusses corporate bonds generally and their relevance in today's capital markets. Next, this Note discusses the recent case of Wilmington Savings Fund Society, FSB v. Cash America International, Inc. *in the U.S. District Court for the Southern District of New York. This Note argues the court incorrectly decided* Cash America *and discusses what implications that incorrect decision has on bond issuers and the corporate bond market. Finally, this Note proposes three solutions that bond issuers can take to remedy the problems presented by* Cash America.

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INTRODUCTION

Bonds have been around for thousands of years, with the first bond recorded in human history dating back to Mesopotamia 2400 B.C.[1] That bond was a surety bond that guaranteed the reimbursement of grain using corn as currency.[2] As time passed, governments started using bonds to fund wars and other government activities starting in the early twelfth century.[3] Corporations began to sell bonds beginning in the early seventeenth century, starting with the Dutch East India Company.[4] In the twentieth century, the bond market began to boom with the entrance of retail investors, mutual funds, and foreign investors.[5] In the twenty-first century, the corporate bond market continued

1. *See* Jared Cummans, *A Brief History of Bond Investing*, BONDFUNDS.COM (Oct. 1, 2014), http://bondfunds.com/education/a-brief-history-of-bond-investing [https://perma.cc/U5LV-EE4M].

2. *See id.*

3. *See id.*

4. *See* Andrew Beattie, *What Was the First Company to Issue Stock?*, INVESTOPEDIA (June 30, 2022), https://www.investopedia.com/ask/answers/08/first-company-issue-stock-dutch-east-india.asp [https://perma.cc/H38G-V5VS].

5. *The Bond Market: A Look Back*, INVESTOPEDIA (Aug. 9, 2022), https://www.investopedia.com/articles/06/centuryofbonds.asp [https://perma.cc/VE5V-AKT2].

to grow and today encapsulates over forty trillion dollars in investments globally.[6] This number far exceeds the market capitalization of the world's largest two stock exchanges, the New York Stock Exchange and the NASDAQ, whose total value of equities were $24.19 trillion and $18.59 trillion, respectively.[7]

Corporate bonds have continued to be a popular investment, but a recent decision in the U.S. District Court for the Southern District of New York disturbed the bond market.[8] In *Wilmington Savings Fund Society, FSB v. Cash America International, Inc.*,[9] the court allowed bondholders to collect a remedy that transgresses from the traditional market's view of remedies.[10] The *Cash America* Court allowed the bondholders to seek specific performance of the expensive redemption premium (the "Make-Whole Premium") as a remedy, instead of the traditional market remedy of par acceleration.[11] Many members of the corporate bar, including some of the world's most prominent law firms, reacted immediately because of the implications this decision may have on their corporate clients and the bond market as a whole.[12] This decision has serious implications for bond issuers because of the inherent dangers of increased litigation driven by opportunistic enforcement by bondholders.[13]

To address the implications of this decision on the bond market, Part I provides background by discussing corporate bonds in general, key corporate bond characteristics, and why bonds are relevant in today's ever-growing capital markets. Part II also discusses *Cash America* in greater detail. Part II explores why the court's decision was incorrect, arguing that the court erred when it granted a remedy that should have been unavailable, and the court incorrectly applied a previous precedent. Part II continues by discussing the implications of the court's incorrect decision on bond issuers. Finally, Part III proposes solutions for bond issuers that aim to correct or avoid the pitfalls created by the *Cash America* ruling.

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6. *Bond Market Size*, INT'L CAP. MKT. ASS'N (Aug. 2020), https://www.icmagroup.org/market-practice-and-regulatory-policy/secondary-markets/bond-market-size [https://perma.cc/XHJ8-BQLD].

7. *See Largest Stock Exchange Operators Worldwide as of June 2022, by Market Capitalization of Listed Companies*, STATISTA (Aug. 29, 2022), https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-market-capitalization-of-listed-companies [https://perma.cc/3YXG-5EH8].

8. *See generally* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016) (describing a court granting an untraditional remedy for the breach of a bond indenture).

9. *See generally id.* (discussing the remedies available for a breach of a bond indenture).

10. *See e.g.*, Mitu Gulati & Marcel Kahan, Cash America *and the Structure of Bondholder Remedies*, 13 CAP. MKTS. L.J. 570, 571–72 (2018) [hereinafter *Structure of Bondholder Remedies*].

11. *See infra* Section I.B.2.

12. *See infra* Section II.C.

13. *See infra* Section II.C.

I. CORPORATE BONDS, THEIR RELEVANCE, AND THE *CASH AMERICA* CASE

This Note briefly touched on corporate bonds and their history in the Introduction. Section I.A expands upon that discussion by explaining corporate bonds generally, some of their key characteristics, and the importance of bonds in today's capital markets. Section I.B will also discuss the *Cash America* case, describe the court's analysis of whether the bond issuer breached its bond contract and the court's analysis of remedies available for breaches of bond contracts.

A. WHAT ARE BONDS AND WHY DO WE CARE ABOUT THEM?

Every corporation needs capital to operate. Of the many ways to raise capital, one popular option for corporations is to offer bonds, specifically, publicly traded bonds.[14] A corporate bond is a debt obligation that investors buy from a company, and that company receives the capital from the purchase in exchange for the promise to pay preestablished interest payments for a set period of time.[15] After that set period of time, that bond "matures," and the company stops making interest payments and repays the original investment to the purchaser of the bond.[16] In other words, the corporate bondholders lend money to the corporation, and, in return, the bondholders receive an "IOU" (the promise of future repayment of the original investment, also called the face value or principal) plus interest payments at a stated interest rate (the coupon rate).[17] Therefore, in theory, each party benefits from the transaction because the bondholders receive consistent interest payments over a period of time and the corporation obtains immediate capital to finance its business operations.[18] Companies can use capital from corporate bond offerings to invest in equipment, fund research and development in products or services, help pay shareholder dividends, refinance debt, or finance an upcoming business combination or consolidation.[19]

Corporate bonds are attractive to corporations and investors alike. The U.S. bond market (comprised of all types of bonds including treasury bonds, corporate bonds, mortgage-backed securities, municipal bonds, etc.) is the largest security market in the world, and corporate bonds make up the second-

14. *See* OFF. OF INV. EDUC. & ADVOC., SEC, WHAT ARE CORPORATE BONDS? 1 (2013), https://www.sec.gov/files/ib_corporatebonds.pdf [https://perma.cc/4L5V-78NF] [hereinafter WHAT ARE CORPORATE BONDS?].

15. James Chen, *Corporate Bond: Definition and How They're Bought and Sold*, INVESTOPEDIA (Nov. 29, 2020), https://www.investopedia.com/terms/c/corporatebond.asp [https://perma.cc/C36V-CYHA].

16. *Id.*; WHAT ARE CORPORATE BONDS?, *supra* note 14, at 1.

17. *See* SCOTT BESLEY & EUGENE BRIGHAM, CFIN: CORPORATE FINANCE 105 (6th ed. 2018).

18. *See id.* at 105–09.

19. *See* WHAT ARE CORPORATE BONDS?, *supra* note 14, at 1.

largest piece of that market because of their popularity.[20] Bonds offer corporate issuers many advantages as opposed to other sources of financing. Bonds offer longer maturity dates, lower interest rates, and fewer restrictions on the use of the funds than bank financing.[21] Bonds are also a cheaper form of financing as opposed to equity financing because equity is riskier and the higher risk requires the company to offer a higher rate of return.[22] Additionally, issuing equity sends a negative signal to the market that the issuer thinks that its company is overvalued.[23]

For many investors, bonds are an attractive investment because they are considered a relatively safe, conservative investment with a reliable income stream through consistent interest payments.[24] Bonds are generally less risky than stocks because stockholders are structurally subordinated to bondholders in the line to be paid in the case of bankruptcy.[25] This means that, relative to stockholders, bondholders are more likely to receive some of their investment back if the company fails.[26] Bonds also pay semi-annual interest payments to give bondholders a stable and predictable return.[27] Stocks can pay dividends, but companies have no duty to start or continue paying dividends to shareholders, whereas bond issuers are obligated to pay the interest payments to bondholders.[28] This is especially useful for investors who have long-term cash matching needs for future payments, such as insurance companies and pension funds.[29] Bonds are also historically less vulnerable to market volatility

20. *See* Kurt Shrout, *The U.S. Bond Market May Be Much Different Than You Think It Is*, LEARNBONDS (Oct. 12, 2020), https://learnbonds.com/news/how-big-is-the-bond-market [https://perma.cc/6DRV-R7E9].

21. *See* Ashley Kilroy, *Bonds vs. Loans: Best Financing Options*, SMARTASSET (Aug. 5, 2021), https://smartasset.com/financial-advisor/bonds-vs-loans [https://perma.cc/3E7T-ED4E]; The Motley Fool, *Bond vs. Note Payable*, NASDAQ (Jan. 21, 2016, 8:44 AM), https://www.nasdaq.com/articles/bond-vs-note-payable-2016-01-21 [https://perma.cc/LY2U-JDZF].

22. *See* WILLIAM W. BRATTON, CORPORATE FINANCE: CASES AND MATERIALS 317–22 (8th ed. 2016).

23. *See id.*

24. *Individual Bonds*, CHARLES SCHWAB, https://www.schwab.com/bonds/individual-bonds/corporate-bonds#beacon-deck—33-card-default-82561 [https://perma.cc/H8NU-UGTT].

25. *Some Advantages of Bonds*, INVESTOPEDIA (Dec. 26, 2020), https://www.investopedia.com/investing/bond-advantages [https://perma.cc/M68X-X44A].

26. *Id.*

27. *Markets Explained: Risks of Investing in Bonds*, PROJECT: INVESTED, http://www.projectinvested.com/markets-explained/what-you-should-know/#topic-risks-of-investing-in-bonds [https://perma.cc/X9EY-Z6SG].

28. *Id.*

29. Bo Becker & Victoria Ivashina, *Reaching for Yield in the Bond Market* 2 (Harv. Bus. Sch. Fin. Working Paper No. 12-103, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2065841 [https://perma.cc/B8Q3-CW2V]. Insurance companies are the biggest institutional holders of corporate bonds. *Id.*

compared to stocks.[30] Many investors use bonds to diversify their portfolios by coupling riskier investments in stocks with a safe investment in corporate bonds.[31]

Bonds and bond issuers come in many different shapes and sizes. There are many different entities that can offer different types of bonds such as corporate bonds, government bonds, municipal bonds, mortgage-backed securities, and agency bonds.[32] This Note will only address corporate bonds. A typical corporate bond has a few key characteristics, such as "price, *face value* (also called *par value*), maturity, [and] coupon rate."[33] The price of the bond is the price at which the bond is trading at on the bond market.[34] As time goes on and the market changes, the price of the bond also changes.[35] When an investor purchases a bond on the bond market, they will pay the market price of the bond to the issuing company at the purchase date.[36] The market price of a bond should reflect the present value of the future cash flows from the bond, the interest payments, and the return of principal.[37]

Since the bond price reflects the present value of the future cash flows of the bond, the price is dependent on the various market and issuer-specific economic conditions. The initial offering of the bonds are usually at face value.[38] Face value (par value) for standard corporate bonds is almost always one thousand dollars because bonds are issued in denominations that are multiples of one thousand dollars.[39] At maturity, the corporation pays the face value amount (i.e., one thousand dollars) back to the bondholders.[40] The maturity date for bonds can vary.[41] Bonds "can be short term (less than three years), medium term (four to 10 years), or long term (more than 10 years)."[42] The focus of this Note is on the issuance of short term bonds, commonly called "notes."[43] However, this Note will discuss "bonds" and "notes" interchangeably since they are fundamentally the same thing, with the main difference being

30. *Markets Explained*, *supra* note 27.

31. *See Individual Bonds*, *supra* note 24.

32. *See id.*

33. WHAT ARE CORPORATE BONDS?, *supra* note 14, at 2.

34. *See* BESLEY & BRIGHAM, *supra* note 17, at 111.

35. *See id.*; *see also* Nick Lioudis, *What Causes a Bond's Price to Rise?*, INVESTOPEDIA (Dec. 11, 2021), https://www.investopedia.com/ask/answers/111414/what-causes-bonds-price-rise.asp [https://perma.cc/W77N-3PXU] (describing what causes bond prices to increase).

36. *See* BESLEY & BRIGHAM, *supra* note 17, at 111; Lioudis, *supra* note 35.

37. *See* Wade Pfau, *How to Make Sense of Bond Pricing*, FORBES (Jan. 24, 2017, 8:00 AM), https://www.forbes.com/sites/wadepfau/2017/01/24/making-sense-of-bond-pricing/?sh=9dd626f5bb8d [https://perma.cc/S738-AJLJ].

38. *See* BESLEY & BRIGHAM, *supra* note 17, at 111; *see also* WHAT ARE CORPORATE BONDS?, *supra* note 14, at 3 ("The price of a bond moves in the opposite direction than market interest rates . . . .").

39. WHAT ARE CORPORATE BONDS?, *supra* note 14, at 2; *see* Chen, *supra* note 15.

40. *See* WHAT ARE CORPORATE BONDS?, *supra* note 14, at 2.

41. *See id.* at 1.

42. *See id.*

43. *See infra* Section I.B.

time to maturity.[44] Notes typically have a shorter term of maturity, and bonds have a longer term of maturity, but both instruments are structured the same.[45] During the life of the bond or note, the corporation pays semiannual interest payments (coupons) based on the stated interest rate (coupon rate) to the bondholders.[46] As market conditions change, the price of the bonds will fluctuate, but the coupon rate remains the same.[47]

All of these key characteristics are memorialized in the indenture.[48] The bond indenture is the legal contract that determines the rights and obligations of the issuer and the bondholders.[49] The indenture is an agreement between the bond issuer and a trustee, and the bondholders are not parties to the agreement.[50] The trustee, which is usually a bank or another financial institution, represents all the bondholders by ensuring that the covenants and conditions of the bond are carried out by the bond issuer according to the terms of the indenture.[51] Thus, "[t]he bondholders are third party beneficiaries of the [obligations] in the indenture," but do not draft or negotiate the indenture.[52] This arrangement eases enforcement by giving one party, the trustee, the power to administer the "interest and principal payments, and monitor[]" compliance of the contract "on behalf of the bondholders."[53]

The issuer's counsel drafts the indenture when the issuer sets out to issue bonds.[54] Unlike a typical contract that is negotiated between the parties to the contract, the bond issuer does not negotiate this contract with the trustee.[55] The issuer's counsel negotiates the bond indenture with "bond counsel," a law firm selected by the investment bank that is underwriting the bond issuance.[56] Bond counsel negotiates against the issuer seeking pro-bondholder provisions in order to make the bonds marketable and easy for the underwriters to sell on the market.[57] This structure promotes the efficiency, marketability, and tradability of bonds because the bonds are

44. *See* The Motley Fool, *supra* note 21. Notes and bonds have trivial differences, but those differences are not relevant for the sake of this Note.

45. *Id.*

46. *See* BESLEY & BRIGHAM, *supra* note 17, at 105.

47. WHAT ARE CORPORATE BONDS?, *supra* note 14, at 2.

48. *See* BESLEY & BRIGHAM, *supra* note 17, at 107.

49. *See id.*

50. *See id. See generally* Complaint Ex. A, Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016), ECF No. 1-1 [hereinafter Indenture] (listing the parties of the agreement as Cash America and the trustee).

51. *See* BESLEY & BRIGHAM, *supra* note 17, at 107.

52. *See* BRATTON, *supra* note 22, at 327–28; Marcel Kahan & Mitu Gulati, *Contracts of Inattention*, 46 L. & SOC. INQUIRY 1115, 1132 (2021) [hereinafter *Contracts of Inattention*].

53. BRATTON, *supra* note 22, at 327–28.

54. *See id.* at 327; *Contracts of Inattention*, *supra* note 52, at 1132.

55. *See* BRATTON, *supra* note 22, at 327–28; *Contracts of Inattention*, *supra* note 52, at 1132.

56. *See Contracts of Inattention*, *supra* note 52, at 1132.

57. *See id.*

sold to a scattered number of bondholders that will trade the bonds on the market.[58] It would be inefficient, if not impossible, for the bond issuer to negotiate each bond contract with each bondholder for every single market trade.[59]

Bond indentures contain covenants restricting the freedom of issuers because of the severe sequential performance issue in bond arrangements.[60] There is a sequential performance issue in bond arrangements because the bondholders perform entirely upfront by purchasing the bond and handing over their money to the company.[61] After that, the bondholders have no further duties to perform; all the performances thereafter are performances of the company—making interest payments, abiding by other covenants in the indenture, and finally, repaying the principal when the bond matures.[62] The bondholders rely on the periodical performance of the bond issuer of paying interest payments over time and the promise to repay the principal after the term of the bond.[63] Covenants ensure that the corporate issuer maintains appropriate levels of risk and that the issuer operates in such a way to ensure future performance of the bond.[64]

Another reason bond indentures contain covenants restricting the freedom of issuers is that corporate issuers do not owe bondholders fiduciary duties.[65] Corporations are set up to run in the best interest of their shareholders.[66] When making business decisions, a corporation's shareholders' best interests often differ from its bondholders' best interests.[67] Bondholders must therefore protect themselves through contract by using covenants to ensure that the issuer does not act in ways that benefit the shareholders at the expense of bondholders.[68]

If the issuer violates a bond covenant, the issuer may be in "default."[69] Each indenture will specify what is considered a default.[70] Generally, default is an event or condition that the occurrence of or existence of when coupled by the passage of time, notice, or both, becomes an "event of default."[71]

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58. *See* BRATTON, *supra* note 22, at 327–28.

59. *See id.*

60. *See id.* at 368–69.

61. *Id.*

62. *Id.* at 368.

63. *Id.*

64. *Id.*

65. *See* George S. Corey, M. Wayne Marr, Jr. & Michael F. Spivey, *Are Bondholders Owed a Fiduciary Duty?*, 18 FLA. ST. U. L. REV. 971, 971 (1991).

66. *See id.*

67. *See id.*

68. *See id.* at 971, 975.

69. *See* BRATTON, *supra* note 22, at 367.

70. *See, e.g.*, Indenture, *supra* note 50, § 6.01; BRATTON, *supra* note 22, at app. A-54–57.

71. *Event of Default: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/event-of-default [https://perma.cc/UG9X-EGV7].

Depending on the indenture, a default can be cured, waived, or ripen into an event of default. However, under the terms of most indentures, some defaults (e.g., a failure to repay principal when due) immediately become events of default.[72] When there is an event of default, the bondholders (through the trustee) can seek remedies as provided in the indenture or otherwise available at law.[73] The standard remedy for events of default before *Cash America* was par acceleration.[74] Par acceleration causes bonds to be immediately due and payable, such that the bond issuer is required to repay the bond's face value plus any interest immediately.[75] As discussed below, *Cash America* shifted away from the standard market view of remedies for events of default and allowed trustees to seek a new remedy.[76]

Although the trustee is supposed to enforce the obligations of the indenture, the reality is that the trustee's job is minuscule. Certain hedge funds (commonly called "vulture funds") specialize in identifying bonds where the issuer has (at least arguably) violated the indenture and caused a default.[77] The vulture funds hope to profit by purchasing the bonds on the market at a price below face value and then declaring an event of default and acceleration, thus requiring the issuer to repurchase the bonds at face value.[78] The more specific the language, the harder it is for vulture funds to attack bond indentures,[79] but these indentures are often long and contain confusing boilerplate language that bondholders and bond issuers gloss over.[80] As shown below, many issues can arise from these boilerplate provisions that result in detrimental effects on bond issuers.

B. CASH AMERICA *AND THE COURT'S FAULTY RULING*

On September 19, 2016, the U.S. District Court for the Southern District of New York rattled the corporate bar with its decision in *Wilmington Savings Fund Society, FSB v. Cash America International, Inc.*[81] The court's interpretation

72. *See id.*

73. *See* BRATTON, *supra* note 22, at 367.

74. *See Structure of Bondholder Remedies*, *supra* note 10, at 571, 574–75.

75. *See id.* at 574–75.

76. *See infra* Part II. But, of course, that "new remedy" is available for bond indentures that include the optional redemption premium and a provision allowing for "other remedies" such as the Indenture. *See id.* These provisions are "boilerplate" and included in most indentures in the market. *Id.*

77. *See, e.g.*, BRATTON, *supra* note 22, at 397–98.

78. *See id.*

79. *See id.*; *see also* Corey et al., *supra* note 65, at 971 ("[T]he bond indenture has over time become simplified, affording bondholders fewer protections.").

80. *See generally Contracts of Inattention*, *supra* note 52 (discussing "contracts of inattention," which are boilerplate agreements that market participants use uniformly, including bond indentures).

81. *Structure of Bondholder Remedies*, *supra* note 10, at 571. *See generally* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016) (holding for the plaintiff to collect the make-whole premium for breach of contract).

of the remedies available when a bond issuer breaches a bond indenture departed from the traditional bond market's interpretation. Specifically, the court departed from what many elite corporate attorneys intended to happen when drafting the bond contract's boilerplate language.[82]

To give some context, Cash America International, Inc. ("Cash America") was a publicly traded Texas corporation that provided "alternative financial services" to individuals without bank accounts, or underbanked individuals, who required quick and easy access to money.[83] These "'alternative financial services' . . . include[d] pawn loans, dispositions of related merchandise, and, to a lesser extent, consumer loans."[84] "Cash America offered its services through two separate [channels]: retail and e-commerce."[85] Cash America's wholly owned subsidiary, Enova International ("Enova"), performed the entire e-commerce channel of the business.[86] Cash America operated the entire retail business.[87]

To raise capital, Cash America completed a private offering of three hundred million dollars' worth of senior notes in accordance with the terms stated in the indenture ("Indenture") on May 15, 2013.[88] The Indenture named Wells Fargo Bank ("Wells Fargo") as the trustee under the Indenture, but the plaintiff, Wilmington Savings Fund Society FSB ("Wilmington Savings"), replaced Wells Fargo as the trustee after Wells Fargo resigned.[89] As in all indentures, this Indenture contained specific provisions describing the legal obligations and restrictions of Cash America, adding that it is the trustee's job to enforce those legal provisions.[90]

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82. *See Structure of Bondholder Remedies*, *supra* note 10, at 572–73.

83. Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment at 5, Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016), ECF No. 27 [hereinafter Defendant's Memo]; *see* Anne Steele, *Pawnshop Operators First Cash, Cash America Agree to Merge*, WALL ST. J. (Apr. 28, 2016, 2:45 PM), https://www.wsj.com/articles/pawnshop-operators-first-cash-cash-america-agree-to-merge-1461867483 [https://perma.cc/U899-T3L2]. Cash America International, Inc. merged with First Cash Financial Services, Inc., and "form[ed] a new company called FirstCash." *Id.* The new company is still based in Texas and is "one of the largest . . . pawn store[s]" in the United States. *Id.*

84. Defendant's Memo, *supra* note 83, at 5.

85. *See Cash Am.*, 2016 WL 5092594, at *1.

86. *Id.*

87. *See id.*

88. Memorandum of Law in Support of Plaintiff's Motion for Summary Judgment at 3–4, Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016), ECF No. 23 [hereinafter Plaintiff's Memo] ("The principal amount of the Notes accrued interest at a rate of 5.75% per annum, and the Notes had a stated maturity of May 15, 2018. The Indenture is governed by New York law.") (citations omitted). *See generally* Indenture, *supra* note 50 (addressing the bond indenture's purpose of raising capital for the company).

89. *See* Defendant's Memo, *supra* note 83, at 5.

90. *See* Indenture, *supra* note 50, § 4.01; *see also supra* Section I.A (discussing bonds and indentures generally).

Seven months after the issuance of the notes, Cash America began contemplating a separation of its e-commerce business from its retail business.[91] As Cash America assessed plans to separate Enova, it needed to keep in mind the provisions of the Indenture. Specifically, Section 5.01 of the Indenture stated, "[Cash America] will not, and will not permit any of its Subsidiaries to, dissolve or liquidate or consolidate or merge with or sell, assign[,] convey, exchange[,] lease or otherwise dispose of its properties to any other [p]erson."[92] There were three exceptions to this provision: (1) Cash America performed the disposition "in the ordinary course of business"[93]; (2) the "[d]isposition constitute[d] the 'Enova Disposition,'" which was a specific structured IPO of Enova's shares[94]; or (3) the disposition was less than ten percent[95] of the book value of Cash America's consolidated total assets.[96] Additionally, the Indenture provided that it is considered an "Event of Default" if Cash America fails to comply with the provision stated above.[97] If there is an "Event of Default," then noteholders can seek remedies pursuant to Article 6 of the Indenture.[98]

On April 10, 2014, Cash America publicly announced that it was reviewing alternatives for its e-commerce business including the evaluation of a tax-free spin-off to separate Enova's online lending from Cash America.[99] A spin-off is a transaction in which:

> [T]he parent company distributes all of the stock of a subsidiary to the parent stockholders in the form of a *pro rata* dividend. After the distribution is completed, the spun-off company is no longer a subsidiary of the parent, and the parent's stockholders hold not only the parent's stock but also the subsidiary's stock. . . . In these transactions, the parent and the parent's stockholders become co-owners of the subsidiary. Whether the parent distributes some or all

91. *See* Defendant's Memo, *supra* note 83, at 8. Cash America's management believed that the separation would benefit the shareholders and allow the separate entities' management teams "to pursue a more focused, industry-specific strategy." *Id.*

92. Indenture, *supra* note 50, § 5.01.

93. *Id.* § 5.01(2)(i).

94. *Id.* § 5.01(2)(ii).

95. The ten percent threshold is reached by taking the lesser amount in the Indenture (seventeen and a half percent) or the amount set forth in the Existing Bank Loan Agreement. *See* Plaintiff's Memo, *supra* note 88, at 4 n.2. "Section 6.5(e) of the Existing Bank Loan Agreement [allowed for] a disposition of 10% of Cash America's Consolidated Total Assets . . . ." *Id.*

96. Indenture, *supra* note 50, § 5.01(2)(iii).

97. *Id.* § 6.01(3).

98. *See id.* § 6.

99. *See* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *2 (S.D.N.Y. Sept. 19, 2016); *Cash America Announces Plans to Evaluate Separation of Online Business*, BUSINESS WIRE (Apr. 10, 2014, 7:01 AM), https://www.businesswire.com/news/home/20140410005329/en/Cash-America-Announces-Plans-to-Evaluate-Separation-of-Online-Business [https://perma.cc/F89L-Z3M4].

> of the subsidiary's stock, the subsidiary will become a publicly held company if the parent is publicly held.[100]

The Enova spin-off would create two separate publicly traded companies: Enova, to operate the e-commerce part of the business, and Cash America, to operate the retail services.[101] Cash America's Board discussed other options[102] but ultimately "decided to structure the separation as a tax-free spin-off of 80% of Enova that would take the form of a dividend of Enova common stock to Cash America's shareholders."[103] This spin-off was very attractive for Cash America and its shareholders because it contained less market risk and complexity than other separation alternatives, created certainty and tax efficiency for shareholders, provided great flexibility for Cash America and its shareholders, and allowed Enova to generate cash flows while maintaining liquidity.[104]

However, Cash America's noteholders must not have felt the same way. On October 22, 2014, River Birch Capital LLC ("River Birch"), one of Cash America's noteholders, claimed that the proposed "spin-off would violate Section 5.01 of the Indenture."[105] In a letter to Cash America, the noteholder stated, "[w]e assume . . . that [Cash America] will not let an Event of Default occur and will honor its obligations to the [n]oteholders under the Indenture by simply redeeming the [n]otes and paying the Make-Whole Premium."[106] River Birch claimed that rather than breach the indenture by spinning off Enova, Cash America should exercise its right to redeem the bonds in accordance with the indenture's Make-Whole Premium provision.[107] Section 3.01, describes the Make-Whole Premium as:

> At any time and from time to time upon not less than 30 nor more than 60 days' notice [Cash America] may redeem some or all of the Notes at a redemption price equal to the greater of the following amounts (x) 100% of the principal amount of the Notes being redeemed on the redemption date, and (y) the sum of the present values of the remaining scheduled payments of principal and interest on the Notes being redeemed on that redemption date (not including the amount of accrued and unpaid interest to but excluding, the

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100. STEPHEN I. GLOVER, BUSINESS SEPARATION TRANSACTIONS: SPIN-OFFS, SUBSIDIARY IPOS AND TRACKING STOCK § 2.02[1] (2002).

101. *See* Plaintiff's Memo, *supra* note 88, at 6–8.

102. *See* Defendant's Memo, *supra* note 83, at 9 ("Cash America's board of directors discussed the advantages and disadvantages of both a spin-off and sale of Enova and the economic considerations of each separation option.").

103. *Id.* at 9.

104. *See id.*

105. Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *2 (S.D.N.Y. Sept. 19, 2016).

106. *Id.*

107. *See id.*

> redemption date) discounted to the redemption date on a semi-annual basis at the Treasury Rate as determined by the Reference Treasury Dealer, plus 50 basis points, plus, in each case, accrued and unpaid interest on the Notes being redeemed to, but excluding, the redemption date.[108]

This Make-Whole Premium is equal to "the sum of the present values of the" principal and the remaining interest payments, discounted at the semiannual treasury rate plus fifty basis points.[109] Due to the treasury rate being significantly lower than the interest rate of the bonds, the Make-Whole Premium would require Cash America to pay a sum much larger than the standard acceleration remedy.[110] Thus, the Make-Whole Premium goes far beyond making the bondholders "whole."[111]

If Cash America did not redeem the notes under the Make-Whole Premium, River Birch's letter claimed that the proposed "spin-off would violate Section 5.01 of the Indenture" and cause an Event of Default.[112] River Birch intended to rely on a combination of two sections of the Indenture as a remedy for the alleged breach, Section 6.03 and the Make-Whole Premium.[113] Section 6.03 states that:

> If an Event of Default occurs and is continuing the Trustee may pursue . . . any available remedy by proceeding at law or in equity to collect the payment of principal of and interest on the Notes or to enforce the performance of any provision of the Notes on the Indenture.[114]

Under Section 6.03, the trustee can pursue any remedy available in law or equity, and presumably, River Birch believed that if Cash America caused an Event of Default, Section 6.03 allows the trustee to seek specific performance of the Make-Whole Premium as a remedy for a breach.[115]

Cash America's counsel reviewed its position and did not agree with River Birch's interpretation of the Indenture.[116] On November 3, 2014, Cash America responded to River Birch, "stating that the spin-off would not breach

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108. Indenture, *supra* note 50, § 3.01.

109. *Id.*

110. This is because in a standard discount cash flow formula, the lower the discount rate, the higher the present value of the future cash flows. For example, if you are discounting $1,000 one year from now at a discount rate of ten percent, the present value would be $909.09. Whereas, if you discount the same $1,000 one year from now at a discount rate of three percent, the net present value would be $970.87, a much larger number. This number is even more skewed as you increase the time period because of compounding interest.

111. *See infra* Section II.B.

112. *See Cash Am.*, 2016 WL 5092594, at *2.

113. *See id.*

114. Indenture, *supra* note 50, § 6.03.

115. *See Cash Am.*, 2016 WL 5092594, at *2; Indenture, *supra* note 50, § 3.01.

116. *See Cash Am.*, 2016 WL 5092594, at *2.

the Indenture" and cause a default or an event of default.[117] Additionally, Cash America stated that even if the spin-off would breach the Indenture and cause an event of default, the only remedy for a breach of the Indenture would be an acceleration of the bonds pursuant to Section 6.02 of the Indenture.[118] Under Section 6.02(a) of the Indenture:

> If an Event of Default, other than a bankruptcy default with respect to the Company, occurs and is continuing under the Indenture, the Trustee . . . may . . . declare the principal of and accrued interest on the Notes to be immediately due and payable. Upon a declaration of acceleration such principal and interest will become immediately due and payable.[119]

Under this provision alone, the notes would "become immediately due and payable," but this provision would not require Cash America to pay the Make-Whole Premium.[120] Cash America's Board of Directors proceeded with the spin-off under the impression that the spin-off did not violate the Indenture.[121] On November 13, 2014, the spin-off was completed.[122]

After the spin-off, River Birch and other vulture funds that were noteholders began to pressure Wilmington Savings to pursue legal action against Cash America.[123] On June 22, 2015, roughly seven months after the completion of the spin-off, the group of vulture funds (including River Birch) sent Wilmington Savings a "Noteholder Request and Indemnification Letter."[124] This letter requested that Wilmington Savings, in its capacity as trustee, commence legal proceedings against Cash America for breach of the Indenture, with the vulture funds agreeing to indemnify Wilmington Savings for any costs incurred during the legal proceedings.[125] Four days later, on June 26, 2015, Wilmington Savings commenced a lawsuit against Cash America for breach of the Indenture in the U.S. District Court for the Southern District of New York.[126] Eventually, both parties moved for summary judgment.[127] At that stage, the court had to address two issues: (1) whether Cash America breached

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117. *See id.*

118. *See id.*

119. Indenture, *supra* note 50, § 6.02(a).

120. *See id.*

121. *See* Defendant's Memo, *supra* note 83, at 9.

122. *See id.*

123. *See id.* at 8, 10 n.2; *Cash Am.*, 2016 WL 5092594, at *2.

124. *See* Defendant's Memo, *supra* note 83, at 10 n.2.

125. *Id.*

126. *See Cash Am.*, 2016 WL 5092594, at *2.

127. *See id.* at *3; *see also* FED. R. CIV. P. 56(a) (explaining that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). Here, both parties essentially only disagreed on a legal issue, and there was no dispute as to the material facts leading up to this case. *See Cash Am.*, 2016 WL 5092594, at *1–3.

the Indenture by completing the Enova spin-off, and if so; (2) what remedies were available as a result of a breach of the Indenture.[128]

1. Did Cash America Breach?

Although this Note focuses on the remedies discussed in *Cash America*, it is helpful to first analyze the court's assessment of whether Cash America breached the Indenture. More specifically, the question before the court was whether the Enova spin-off violated Section 5.01 of the Indenture. To recap, Section 5.01 stated that neither Cash America nor its subsidiaries could dissolve, merge, sell, assign, convey, or exchange any property unless it fell into one of the three exceptions.[129] Wilmington Savings argued that none of the three exceptions in Section 5.01 applied, hence, the Enova spin-off constituted a breach of the Indenture.[130] Cash America conceded that the first two exceptions in Section 5.01 did not apply but maintained that the Enova spin-off was permitted by the third exception in Section 5.01 because it did not exceed the ten percent disposition limit.[131] There was no dispute that the disposition limit of ten percent of Cash America's consolidated assets was $208 million.[132] But each side had a different interpretation of how to calculate book value in accordance with Section 5.01(7) of the Indenture.[133] Cash America argued the book value of Enova should be calculated by taking Enova's assets minus liabilities.[134] Under this interpretation, the book value of the Enova spin-off would have been less than half of the $208 million disposition limit.[135] In contrast, Wilmington Savings argued that the book value should be calculated by looking at assets alone.[136] Under this interpretation, the book value of the Enova spin-off would have a book value three times greater than the disposition limit.[137]

After analyzing both sides' arguments, the court agreed with Wilmington Savings' interpretation and declared that the Enova spin-off constituted a

128. *See Cash Am.*, 2016 WL 5092594, at *3–8.

129. *See* Indenture, *supra* note 50, § 5.01; *supra* notes 92–96 and accompanying text.

130. *See* Plaintiff's Memo, *supra* note 88, at 9–11.

131. *See* Defendant's Memo, *supra* note 83, at 11–13.

132. *See id.* at 1; Plaintiff's Memo, *supra* note 88, at 11.

133. *Cash Am.*, 2016 WL 5092594, at *3.

134. *Id.*; *see* Defendant's Memo, *supra* note 83, at 12–13; Reply Memorandum of Law in Support of Defendant's Cross-Motion for Summary Judgment at 4–5, Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016), ECF No. 43 [hereinafter Defendant's Reply Memo].

135. *See* Defendant's Memo, *supra* note 83, at 12–13.

136. *See Cash Am.*, 2016 WL 5092594, at *3; Plaintiff's Memo, *supra* note 88, at 11; Reply Memorandum of Law in Further Support of Plaintiff's Motion for Summary Judgment and in Opposition to Defendant's Motion for Summary Judgment at 3–4, Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016), ECF No. 39 [hereinafter Plaintiff's Reply Memo].

137. *See* Plaintiff's Memo, *supra* note 88, at 11.

breach of the Indenture.[138] The court looked at the plain meaning of Section 5.01(7) and determined that the property disposed of in this situation was the equity of Enova and referred to only Enova's assets, not its liabilities.[139] The court ruled that "the Enova spin-off did not fall within" the Section 5.01 exceptions.[140] As a result, the Enova spin-off breached the Indenture and caused an event of default.[141]

2. Court's Remedies for Breach

After the court declared that the Enova spin-off was a breach of the Indenture, the court addressed the remedies available to the noteholders.[142] The remedies aspect of the court's ruling was novel and alarmed the corporate law world.[143] Wilmington Savings argued that the proper remedy was specific performance[144] of the Make-Whole Premium in Section 3.01 of the Indenture.[145] Cash America argued that the only remedy available should be acceleration of the notes, which would result in a payment of nearly fourteen percent less than the payment of the Make-Whole Premium.[146] Wilmington Savings based its argument on *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*[147] In *Sharon Steel*, the bond issuer issued several debt instruments through multiple indentures.[148] Much like the Indenture in *Cash America* and almost all indentures on the market, the indentures in *Sharon Steel* included make-whole redemption premium provisions, acceleration in the event of default provisions, and an "other remedies" provisions.[149] In addition, the indentures contained successor obligor clauses which allowed the issuer to assign the debt to successors if the successor purchased all or substantially all of its assets.[150] The successor obligor clauses required that after such sale

138. *See Cash Am.*, 2016 WL 5092594, at *4.

139. *See id.*

140. *Id.*

141. *See id.* at *5.

142. *See id.*

143. *See Structure of Bondholder Remedies*, *supra* note 10, at 572–73.

144. Specific performance is "a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate." *Specific Performance*, BLACK'S LAW DICTIONARY (11th ed. 2019). Section 6.03 of the Indenture explicitly makes specific performance available—"[i]f an Event of Default occurs and is continuing the Trustee may pursue . . . any available remedy . . . to enforce the performance of any provision of the Notes or the Indenture." Indenture, *supra* note 50, § 6.03.

145. *See* Plaintiff's Memo, *supra* note 88, at 12–18.

146. *See* Defendant's Memo, *supra* note 83, at 2–3, 21 n.5.

147. *See generally* Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982) (discussing remedies for a breach of a bond indenture similar to the one at issue in *Cash America*). Precedent is lacking because it is very rare to see defaults of indentures outside of bankruptcy. *See Cash Am.*, 2016 WL 5092594, at *6.

148. *See Sharon Steel*, 691 F.2d at 1042.

149. *Id.* at 1042–43, 1053.

150. *Id.* at 1043–45.

of all or substantially all of its assets, the issuer would be required to pay off all the debt, unless the issuer assigned the debt to a successor.[151]

In *Sharon Steel*, the bond issuer began liquidating its assets piece by piece.[152] When selling its last large group of assets, the issuer attempted to assign all of its debt to the last purchaser in its piecemeal liquidation.[153] The Second Circuit held that this was a breach of the indentures.[154] As for remedies, the court held that because the acceleration provision is permissive of all remedies, there is "no bar, therefore, to the Indenture Trustees seeking specific performance of the redemption provisions where the debtor causes the [bonds] to become due and payable by its voluntary actions."[155] In such circumstances, the court stated, "the redemption premium must be paid."[156] In *Cash America*, Wilmington Savings argued that *Sharon Steel* was controlling law and therefore the court can award specific performance of the Make-Whole Premium because the Enova spin-off was a "voluntary" event of default.[157]

Cash America argued in contrast that the plain language of the Indenture meant the only remedy available was provided in Section 6.02, which stated the Trustee could accelerate the notes to be immediately due and payable if there was an event of default.[158] Cash America claimed that if the Enova spin-off was a breach of the Indenture, then the Make-Whole Premium was not an available remedy.[159] Based on the plain meaning of Sections 3.01 and 3.02, Cash America argued that only it could trigger the Make-Whole Premium to redeem some or all of the notes by sending a notice to the noteholders.[160] Since Cash America did not send notice, the company maintained that Wilmington Savings did not have the authority to trigger the Make-Whole Premium.[161]

Additionally, Cash America argued that *Sharon Steel* was not applicable because *Sharon Steel* required bad faith conduct to trigger the Make-Whole Premium.[162] Two subsequent cases citing *Sharon Steel* infer that bad faith conduct

151. *Id.* at 1044–45.
152. *Id.* at 1045–46, 1049–50.
153. *Id.* at 1046–47.
154. *Id.* at 1052–53.
155. *Id.* at 1053.
156. *Id.*
157. *See* Plaintiff's Memo, *supra* note 88, at 14–17; Plaintiff's Reply Memo, *supra* note 136, at 9–15.
158. *See* Defendant's Memo, *supra* note 83, at 13–16; Defendant's Reply Memo, *supra* note 134, at 4–6; Indenture, *supra* note 50, § 6.02.
159. *See* Defendant's Memo, *supra* note 83, at 14–16.
160. *See id.*
161. *See id.* at 14.
162. *See id.* at 16–20.

is required to collect the redemption premium.[163] Those cases interpreted *Sharon Steel* as requiring bad faith conduct to evade the Make-Whole Premium, using default as a tactical device[164] or intentional default to force acceleration of the notes.[165] With those two interpretations, Cash America claimed *Sharon Steel* was not applicable because there was no bad faith conduct or any suggestion that the Enova spin-off was a tactical device to avoid the prepayment premium.[166]

The court agreed with Wilmington Savings' argument that *Sharon Steel* was the controlling law on the remedies for breach of the Indenture and granted specific performance of the Make-Whole Premium to the noteholders.[167] Although it is settled New York law that "once a debt is accelerated, lenders may not collect a prepayment or make-whole fee," there can be contractual provisions that provide for acceleration and prepayment.[168] As the court explained, this case is much different from many situations of default because this default occurred outside of bankruptcy.[169] The court stated that because Cash America's default was not due to bankruptcy, it is considered to be "voluntary" under *Sharon Steel*.[170] Further, the court stressed that Cash America had prior notice that the bondholders thought the spin-off would constitute a breach and proceeded anyway.[171] The court found this as additional evidence of a voluntary breach.[172] Therefore, Wilmington Savings was not limited to pursuing acceleration as a remedy but was entitled to the Make-Whole Premium as well.[173] "[T]he Indenture provision immediately following the acceleration clause, titled 'Other Remedies,' explicitly affords the Trustee 'any available remedy by proceeding at law or in equity . . . to enforce the performance of any provision of the [n]otes or the Indenture.'"[174] The court stated that the Indenture language was very similar to the indenture

163. *See In re* MPM Silicones, LLC, No. 14-22503, 2014 WL 4436335, at *13 (Bankr. S.D.N.Y. Sept. 9, 2014) (discussing how *Sharon Steel* requires bad faith conduct); *In re* Granite Broad. Corp., 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007) (discussing how *Sharon Steel* required bad faith conduct such as using the breach as a tactical device).

164. *See In re MPM Silicones*, 2014 WL 4436335, at *13.

165. *See In re Granite Broad.*, 369 B.R. at 144.

166. *See* Defendant's Memo, *supra* note 83, at 20.

167. Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *6 (S.D.N.Y. Sept. 19, 2016).

168. *Id.*

169. *See id.* Although it is not conclusive, default due to involuntary bankruptcy would trigger acceleration and not a payment of the Make-Whole Premium. *See In re* LHD Realty Corp., 726 F.2d 327, 330–31 (7th Cir. 1984); *In re* AMR Corp., 730 F.3d 88, 98–100 (2d Cir. 2013).

170. *See Cash Am.*, 2016 WL 5092594, at *6.

171. *See id.* at *6–7.

172. *See id.*

173. *Id.* at *6.

174. *Id.* at *7 (alteration in original) (emphasis omitted) (quoting Indenture, *supra* note 50, § 6.03).

language at issue in *Sharon Steel* and that the Second Circuit denied Cash America's same argument when presented in *Sharon Steel*.[175]

Further, Cash America's argument that *Sharon Steel* required bad faith conduct did not persuade the court.[176] Although dicta in subsequent cases suggest that in order to trigger acceleration the debtor must have intentionally defaulted as a "tactical device," the court found no support in *Sharon Steel* itself to corroborate this claim.[177] Even if the court were to follow the dicta of subsequent cases citing *Sharon Steel*, it was "reluctant to introduce the issue of subjective intent into the analysis" for fear that courts would struggle to interpret the intent of a company and "the fact that contract remedies are generally designed to compensate the non-breaching party, not punish the breaching party for bad intent."[178] Based on this analysis, the court determined that the spin-off was a breach of the Indenture and as a result of the breach, that the trustee could seek the Make-Whole Premium and acceleration as remedies.[179]

II. WHY THE *CASH AMERICA* RULING WAS INCORRECT AND HAS SERIOUS IMPLICATIONS FOR CORPORATIONS ISSUING BONDS

Part II argues that the court incorrectly decided *Cash America*. Section II.A concludes that the court incorrectly decided *Cash America* on the issue of remedies because the specific performance of the Make-Whole Premium was not an available remedy in contract or in equity, and the court improperly applied *Sharon Steel*. Next, Section II.B discusses how the court's remedy in the *Cash America* case was problematic from the market's perspective and overcompensatory for the bondholders. Section II.C concludes by discussing the problems that *Cash America* has caused and will continue to cause if bond issuers do not act.

A. THE COURT INCORRECTLY DECIDED CASH AMERICA *BECAUSE SPECIFIC PERFORMANCE SHOULD NOT HAVE BEEN AN AVAILABLE REMEDY AND THE COURT RELIED ON A FAULTY PRECEDENT*

Both parties would likely agree that the Make-Whole Premium was not an available contractual remedy. This Indenture contained the same boilerplate

175. *Id.* at *6–7; *see also* Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1053 (2d Cir. 1982) ("Judge Werker held that the redemption premium under the indentures need not be paid by [the bond issuer]. His reasoning was essentially that [the bond issuer] defaulted under the indenture agreement and that the default provisions provide for acceleration rather than a redemption premium. We do not agree.").

176. *See Cash Am.*, 2016 WL 5092594, at *7 n.4.

177. *See id. See generally Sharon Steel*, 691 F.2d (stating nothing about using default as a tactical device).

178. *Cash Am.*, 2016 WL 5092594, at *7; *accord* Metro. Life Ins. Co v. Noble Lowndes Int'l, Inc., 643 N.E.2d 504, 507 (N.Y. 1994).

179. *Cash Am.*, 2016 WL 5092594, at *8.

language as most bond indentures in the market[180] and was governed by New York law.[181] Under New York law, interpretations of bond contract provisions are a matter of basic contract law.[182] "[W]hen parties set down their agreement in a clear, complete document, their writing should[,] as a rule[,] be enforced according to its terms."[183] Simply stated, New York law requires that a contract be enforced according to the plain meaning of the terms in the contract, and no outside evidence can be used to distort the contract or create ambiguity.[184] Here, the plain meaning of the Indenture was clear as to available contractual remedies. Sections 6.02 and 6.03 of the Indenture provided that the trustee could have sought acceleration in the event of default as a contractual remedy or any available remedy in law or equity to collect the "[n]otes or to enforce the performance of any provision of the [n]otes or the Indenture" in the event of default.[185] Additionally, Section 3.01, titled "Optional Redemption," provided that only Cash America could redeem some or all of the notes at the Make-Whole Premium and said nothing about the trustee having the ability to redeem the notes in the event of default.[186] Thus, acceleration was likely the only contractual remedy.

The specific performance of the Make-Whole Premium was not an available remedy in equity because a court cannot use its equitable powers to redraft the contract to create an obligation that is not stated in the agreement.[187] Specific performance is a remedy in equity.[188] It is settled under New York law that a party trying to enforce the performance of a contract cannot require the other contracting party to perform a provision that it is not required to perform under the terms of the agreement.[189] That is, a party cannot create an obligation on behalf of the other contracting party if that obligation was not prescribed in the contract.[190] It follows that a court in equity cannot enforce the performance of an obligation that a party was not obligated to

180. *See Contracts of Inattention*, *supra* note 52, at 1116.

181. *See* Indenture, *supra* note 50, § 11.07.

182. Quadrant Structured Prods. Co. v. Vertin, 16 N.E.3d 1165, 1171 (N.Y. 2014).

183. W.W.W. Assocs., Inc. v. Giancontieri, 566 N.E.2d 639, 642 (N.Y. 1990).

184. *See* 28 GLEN BANKS, NEW YORK PRACTICE SERIES—NEW YORK CONTRACT LAW § 9:5 (2d ed. 2022). *See generally* Heller v. Pope, 164 N.E. 881 (N.Y. 1928) (describing that the plain meaning of a contract cannot be changed by outside or parol evidence when it is clear and unambiguous).

185. Indenture, *supra* note 50, §§ 6.02–6.03.

186. *Id.* § 3.01.

187. *See, e.g.*, Terwilliger v. Terwilliger, 206 F.3d 240, 245 (2d Cir. 2000) (explaining that a court cannot redraft contracts with its equitable powers based on the court's internal instincts from the facts of the case).

188. *See, e.g.*, Niagara Mohawk Power Corp. v. Graver Tank & Mfg. Co., 470 F. Supp 1308, 1325–26 (N.D.N.Y. 1979) (describing that a court uses its equitable powers when granting specific performance of a contract).

189. *See* Brody v. W. & L. Enters., Inc., 117 N.Y.S.2d 719, 722 (Sup. Ct. 1952) (stating that one cannot require a party to perform an obligation that the party was not required to perform under the terms of the contract).

190. *See id.*

perform.[191] "[N]o court has the power to make a new contract for the parties which shall confer rights where no rights at all originally existed."[192]

The Indenture stated that solely Cash America had the option to redeem the notes at the Make-Whole Premium.[193] The Indenture did not say that Cash America "must" redeem the notes or that Cash America "shall" redeem the notes. Additionally, there was no provision of the Indenture that allowed the trustee to trigger the Make-Whole Premium or seek the Make-Whole Premium as a remedy in the case of a breach. The court looked at the interplay of Sections 3.01 and 6.03 to conclude that it could require specific performance of the Make-Whole Premium.[194] Section 6.03 provided for "any available remedy . . . to enforce the performance of any provision of the [n]otes or the Indenture,"[195] but a court cannot create an obligation of performance that does not exist in the contract, such that it requires the performance of a provision that is optional to Cash America exclusively.

The court used its equitable powers to essentially rewrite the agreement to create an obligation for Cash America to redeem at the Make-Whole Premium when no obligation to redeem previously existed. The Indenture stated that Cash America has an *option* to redeem by giving notice.[196] Drafters of indentures include this boilerplate *optional* redemption provision for the benefit of bond issuers.[197] Plainly on its face, the provision gives no rights to the bondholders. The *Cash America* Court essentially used its equitable powers to rewrite the agreement and created an *obligation* on behalf of Cash America and gave a nonexistent right to the bondholders. This remedy should not have been available in equity.

Additionally, the *Cash America* Court should not have relied on *Sharon Steel* to grant specific performance of the Make-Whole Premium as a remedy. *Sharon Steel* should not be controlling law because the *Cash America* Court wrongfully applied the meaning of "voluntary" as it was used in *Sharon Steel*. The *Sharon Steel* Court allowed for specific performance of the make-whole premium because of the debtor's "voluntary actions."[198] It is hard to ascertain what the court exactly meant by "voluntary actions," but the facts seem to point to that definition as meaning more than a single action of the issuer. In

191. *See* JOHN NORTON POMEROY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS, AS IT IS ENFORCED BY COURTS OF EQUITABLE JURISDICTION, IN THE UNITED STATES OF AMERICA 451 (1879).

192. *Id.*

193. *See* Indenture, *supra* note 50, § 3.01.

194. Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *6–8 (S.D.N.Y. Sept. 19, 2016).

195. Indenture, *supra* note 50, § 6.03.

196. *Id.* § 3.01.

197. *See* BRATTON, *supra* note 22, at 353–54.

198. *See* Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1053 (2d Cir. 1982).

Sharon Steel, the issuer began liquidating its assets piece by piece.[199] The trustee alerted the issuer that the first step of the liquidation violated the indentures and demanded that the issuer either pay off the debt or set up a trust to secure the debt.[200] Under threat of lawsuit, the issuer agreed to enter into an agreement with the trustee where the issuer set up a separate trust to secure its debt, agreed to present a proposal to the trustee to pay off the debt, and the issuer's obligations under the indentures would terminate upon payment of the debt or abandonment of the liquidation plan.[201] Months later, the issuer intentionally and in bad faith, tried to invoke the successor obligor clause to its final piecemeal sale of the company's assets and claimed it was selling all or substantially all of its assets.[202] This would essentially breach the new agreement, transfer the obligations to the successor company, and relieve the debtholder of its obligation of payment of the debt.[203]

Based on the facts of the case, it seems that "voluntary action" need be more than simply an act of the company that causes default. Rather, "voluntary action" in *Sharon Steel* was a company that acted with the knowledge that the action caused an event of default, and intentionally proceeded with that action in bad faith. The issuer in *Sharon Steel* was aware that they caused an event of default.[204] After becoming aware of the event of default, it entered into an agreement to resolve the event of default with the trustee by prepaying the debt.[205] Then, the issuer intentionally and unsuccessfully tried to tactically invoke the successor obligor clause in bad faith to avoid payment of the redemption premium.[206] The court stated it can grant specific performance of the make-whole premiums because "[t]he default here stemmed from the plan of voluntary liquidation . . . followed by the unsuccessful attempt to invoke the successor obligor clauses."[207] Thus, the "voluntary action" must mean something more than one mere action of a bond issuer that leads to default, but rather some additional, intentional, bad faith conduct.

This Note's reading of "voluntary action" is not entirely new.[208] In fact, two subsequent cases following *Sharon Steel* interpreted the case to require bad

199. *Id.* at 1045–46.

200. *Id.*

201. *See id.* at 1046.

202. *Id.*

203. *See id.*

204. *See id.* at 1045–46.

205. *See id.*

206. *Id.* at 1046–47, 1053.

207. *Id.* at 1053.

208. *See supra* notes 163–65 and accompanying text; *see also The Redemption 'Make Whole' Remedy Controversy—An Easy Fix*, KRAMER LEVIN (Jan. 20, 2017), https://www.kramerlevin.com/en/perspectives-search/the-redemption-make-whole-remedy-controversy-an-easy-fix.html [https://perma.cc/D8UJ-28E3] (discussing how market participants thought the make-whole was only an available remedy when there was intentional default to avoid paying the make-whole).

faith—which Cash America did not have in pursuing the Enova spin-off.[209] Bad faith conduct is not explicitly mentioned in *Sharon Steel*,[210] but the bond issuer's conduct in *Sharon Steel* is clearly bad faith conduct. Subsequent courts thus found that *Sharon Steel* implicitly requires bad faith conduct such as "intentionally default[ing] . . . to trigger acceleration and evade the prepayment premium or make-whole,"[211] or using default as "a tactical device to deprive" bondholders of their contractual rights.[212]

The *Cash America* Court thought that because Cash America acted voluntarily, as opposed to involuntarily (i.e., bankruptcy), the Enova spin-off was the "voluntary action" similar to the issuer in *Sharon Steel*.[213] The court was reluctant to apply a bad faith requirement to "voluntary action" because of the inherent difficulty of trying to determine a party's subjective intent.[214] Admittedly, the intent of a corporation is hard to ascertain because it is hard to observe the "mind" of an entire business entity.[215] Yet, the subjective intent of Cash America is not difficult to determine, and Cash America did not engage in bad faith conduct.

The record demonstrates that Cash America did not engage in bad faith conduct because the Enova spin-off had a legitimate business purpose and did not materially harm the bondholders.[216] Moreover, after the bondholders sent notice that the Enova spin-off may breach the Indenture, Cash America had its position reviewed by counsel and continued paying interest payments.[217]

After a review by counsel, Cash America did not believe the Enova spin-off was a violation of the Indenture, and it continued business as usual.[218] In fact, Cash America had to make two interest payments to its bondholders on November 15, 2014 and May 1, 2015, both occurring after the spin-off and

209. *See supra* notes 163–65 and accompanying text.

210. *See generally Sharon Steel*, 691 F.2d (discussing how a company's breach was to avoid redemption payment, but the court does not state that bad faith conduct is required).

211. *In re* MPM Silicones, LLC, No. 14-22503, 2014 WL 4436335, at *13 (Bankr. S.D.N.Y. Sept. 9, 2014).

212. *See id.; see also In re* Granite Broad. Corp., 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007) (discussing the intentional use of default to evade paying the prepayment premium).

213. *See* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *6–7 (S.D.N.Y. Sept. 19, 2016).

214. *Id.* at *7.

215. *See* Ann Foerschler, *Corporate Criminal Intent: Toward a Better Understanding of Corporate Misconduct*, 78 CALIF. L. REV. 1287, 1296–97 (1990) (discussing corporate criminal intent and how courts have struggled to ascertain a corporation's intent).

216. *See supra* Section I.B.

217. *See Cash Am.*, 2016 WL 5092594, at *2. Counsel determined that the Enova spin-off would not constitute an event of default. *Id.* This is likely because its counsel had a different calculation for what was considered ten percent of Cash America's net assets. *See* Defendant's Memo, *supra* note 83, at 18 n.4; *supra* Section I.B.1.

218. *See Cash Am.*, 2016 WL 5092594, at *2; Defendant's Memo, *supra* note 83, at 18 n.4.

before Wilmington Savings filed suit.[219] If Cash America wanted to voluntary default and cause acceleration, it would have tried to accelerate the bonds on the date of the spin-off and not continued to pay the interest payments. This reasonably suggests that Cash America's likely intention was not to cause an event of default to accelerate the notes to avoid paying the Make-Whole Premium. Cash America proceeded as if it was not a violation of the Indenture, was financially stable, and could (and almost certainly planned to) continue making interest payments.[220] As opposed to *Sharon Steel*, Cash America's conduct was not bad faith. If the *Cash America* Court would have properly applied the definition of "voluntary" from *Sharon Steel*, it is clear that Cash America did not "voluntarily" default.

B. THE COURT CREATED A "NEW" REMEDY THAT IS INEQUITABLE AND OVERCOMPENSATORY

The *Cash America* court's interpretation of the remedies available under the Indenture contradicted the obvious market interpretation of the remedies available in bond indentures.[221] Due to how bond indentures are negotiated, the market needs to have a clear meaning of their indenture terms. As previously stated, the corporation's counsel drafts the indenture agreement and negotiates the terms with the underwriter's bond counsel.[222] These are sophisticated lawyers who work on and encounter thousands of bond indentures in their practice. Many corporations' bond indentures contain the same boilerplate language.[223] Courts hold corporations and their counsel as being on notice of the use or absence of any publicly known indenture provisions and how courts interpret them.[224] Thus, it is very important that courts correctly interpret indenture provisions because one incorrect interpretation of a single indenture can have a large impact on other indentures and the bond market as a whole.[225]

Cash America effectively created a new remedy that allows a party to seek specific performance of the Make-Whole Premium.[226] This remedy was not

219. *See* Indenture, *supra* note 50, § 1.01 (describing that the interest payment dates were due on November 15 and May 15 each year); *Cash Am.*, 2016 WL 5092594, at *2; Defendant's Memo, *supra* note 83, at 18 n.4.

220. *See* Defendant's Memo, *supra* note 83, at 18 n.4.

221. *See Structure of Bondholder Remedies*, *supra* note 10, at 571–72.

222. *See supra* Section I.A.

223. *See Contracts of Inattention*, *supra* note 52, at 1115–16.

224. *See, e.g.*, Roseton OL, LLC v. Dynegy Holdings Inc., No. 6689, 2011 WL 3275965, at *10–11 (Del. Ch. July 29, 2011). *See generally, e.g.*, Metro. Life Ins. Co. v. RJR Nabisco, Inc., 716 F. Supp. 1504 (S.D.N.Y. 1989) (describing how Metropolitan Life is on notice of provisions in bond indentures that are on the market because it and its lawyers are sophisticated parties).

225. *See Metro. Life*, 716 F. Supp. at 1515–16 (discussing the importance of uniform interpretation).

226. *See* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *1–8 (S.D.N.Y. Sept. 19, 2016).

something the market had ever seen before.[227] As previously stated, the standard remedy for a violation of a bond indenture was par acceleration.[228] This is evidenced by the reaction to the *Cash America* decision from numerous corporate law firms.[229] These firms sent out memoranda criticizing the ruling, but these were the same law firms that drafted indentures similar to the one in *Cash America*.[230] This makes it apparent that these firms did not intend for this remedy and felt the plain language of their indentures did not allow for these remedies.[231] Even with *Sharon Steel* previously allowing for the collection of a redemption premium,[232] this remedy was "new" to these law firms.[233] For example, a poll of forty experienced transactional lawyers showed that all forty lawyers generally saw *Cash America* as changing the law of remedies for bond indentures.[234] The market and the drafters of indentures saw the court's decision as a creation of a new remedy because the Make-Whole Premium was understood to be previously available.[235]

The new *Cash America* remedy is overcompensatory, inequitable, and diverges from basic contract law principles. In general, the remedies for a breach of contract are meant to be compensatory.[236] Such remedies are

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227. *See Structure of Bondholder Remedies*, *supra* note 10, at 576; *Contracts of Inattention*, *supra* note 52, at 1116–17.

228. *See Structure of Bondholder Remedies*, *supra* note 10, at 571, 574–75.

229. There were many law firms that sent out memoranda to clients or posted on their websites expressing their disagreement with the court's decision. *See, e.g.*, Matthew A. Feldman, Joseph G. Minias, Weston T. Eguchi & Jason D. St. John, *Court Holds Issuer Liable for a Make-Whole Based on Its Voluntary Breach of an Indenture*, WILLKIE FARR & GALLAGHER LLP (Oct. 6, 2016), https://www.willkie.com/~/media/Files/Publications/2016/10/Court_Holds_Issuer_Liable_for_a_Make_Whole_Based_on_Its_Voluntary_Breach.pdf [https://perma.cc/UGT3-KT7Y]; *Memorandum: Third Circuit Holds that Noteholders in a Bankruptcy Are Entitled to a Make-Whole Premium, Rejecting Approach of the Southern District of New York in* Momentive, SIMPSON THACHER & BARTLETT LLP (Dec. 5, 2016), https://www.stblaw.com/docs/default-source/memos/firmmemo_12_05_16.pdf [https://perma.cc/39RW-6YA3]; Brian V. Breheny et al., *Court Ruling May Broaden Noteholders' Ability to Receive Redemption Premiums Following Indenture Defaults*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Oct. 5, 2016), https://www.skadden.com/insights/publications/2016/10/corporate-finance-alert-court-ruling-may-broaden-n [https://perma.cc/7KU9-7W3E]; *see The Redemption 'Make Whole' Remedy Controversy*, *supra* note 208.

230. *See supra* note 229 and accompanying text.

231. *See supra* note 229 and accompanying text.

232. *See* Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1053 (2d Cir. 1982).

233. *See Contracts of Inattention*, *supra* note 52, at 1120–21.

234. *Id.* at 1116–17, 1120–22, 1126. The study suggests four reasons for the possibility that law firms ignored *Sharon Steel*. First, the transactional lawyers simply may have forgotten about *Sharon Steel*. *Id.* at 1120. Second, they may have seen *Sharon Steel* as *sui generis*. *Id.* at 1120–21. Third, they may not have focused on *Sharon Steel*'s holding regarding the redemption premium because it was only two paragraphs of the case. *Id.* at 1121. Lastly, they may have seen *Sharon Steel* as not applying unless the bond issuer is liquidating. *Id.* at 1121–22.

235. *See id.* at 1126; *supra* note 229 and accompanying text.

236. *See* ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 841–42 (5th ed. 2013).

supposed to protect the expectation interest of the non-breaching party by putting that party in as good of a position as if the contract had been performed.[237] Compensatory damages in contract law are designed to promote efficiency, reliability, and fairness in contracting by allowing the non-breaching party to be made whole without punishing the breaching party.[238] If a contractual remedy is inadequate to compensate for a party's loss, the court may award specific performance to protect the expectation interest of the non-breaching party.[239] A court should not allow specific performance as a remedy unless other remedies are insufficient to fulfill the bondholders' expectancy interest or place them in a position as if the contract had been performed.[240] Remedies are not supposed to be "overcompensatory"—they are not intended to place a party in a better position than if the contract had been performed by the breaching party.[241] If remedies generally placed the non-breaching party in a better position than if the contract had been carried out, it would impede the efficiency, reliability, and fairness of contracting. Such a remedy would discourage parties from contracting for fear that they may have to overcompensate in the case of accidental or efficient breaches.[242] An overcompensatory remedy is in essence a punitive remedy that discourages efficiency in contracting and gives the non-breaching party more benefit than they bargained for in the contract.[243]

By allowing Wilmington Savings to seek specific performance of the Make-Whole Premium, the *Cash America* ruling allows for an overcompensatory and inequitable remedy because it put the bondholders in a better position than if the contract had been carried out.[244] The Make-Whole Premium is a misnomer because it goes far beyond making the bondholders "whole." The Make-Whole Premium is the present value of the principal and remaining interest payments discounted at an extremely low discount rate of the risk-free rate plus fifty basis points.[245] Due to the discount rate being so small, the Make-Whole Premium amount is much larger than the pre-default market price and is overcompensatory in nature.[246] The price of the bond on the market generally reflects the present value of the bond's future cash flows

237. RESTATEMENT (SECOND) OF CONTS. § 344 cmt. a (AM. L. INST. 1981); SCOTT & KRAUS, *supra* note 236, at 841–42.

238. *See* SCOTT & KRAUS, *supra* note 236, at 841–43; 28A GLEN BANKS, *supra* note 184, § 23:2.

239. RESTATEMENT (SECOND) OF CONTS. § 359 cmt. a (AM. L. INST. 1981).

240. *Id.*

241. *See* SCOTT & KRAUS, *supra* note 236, at 841–42.

242. *See id.* at 100–01, 842.

243. *See id.* at 842, 893.

244. Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *6–8 (S.D.N.Y. Sept. 19, 2016).

245. *Id.* at *5; *see also* Indenture, *supra* note 50, § 3.01 (discussing the optional Make-Whole Premium).

246. *See Structure of Bondholder Remedies*, *supra* note 10, at 581; s*ee also supra* note 110 and accompanying text (discussing why the Make-Whole Premium is such a large number).

(i.e., the remaining interest payments and return of the principal).[247] The bond's market price is a fair evaluation of the present value of the bond's future cash flows or the investor's expectancy interest.[248] Controlling all other factors, the price of the bond the day before the announcement of the Enova spin-off would be the expectancy interest for the bondholders.

Therefore, by allowing the bondholders to seek specific performance of the Make-Whole Premium, the bondholders are receiving more money than the pre-spin-off bond price and thus more than the bondholders expected to obtain from the bond's future cash flows. Contractual remedies are not meant to punish the breaching party but rather to place the non-breaching party in the same expected position as when the parties entered the contract. The *Cash America* court effectually allowed the bondholders to seek a punitive remedy that would have traditionally been unavailable for breach of contract.[249] At its core, contract law should address relieving promises by protecting expectations if there is a breach, not forcing the compulsion of promises[250] like the court did in *Cash America*.

The traditional remedy, par acceleration, is a better remedy than the Make-Whole Premium because it fulfills the bondholders' expectancy interest. Par acceleration allows the bondholders to accelerate the bonds and declare the par value of the bond, and all unpaid accrued interest on the notes becomes immediately due and payable in the event of default.[251] This allows the bondholders to receive what they expected from the transaction—the return of their initial investment and interest accrued up to the date of the triggering of the acceleration. Concededly, par acceleration is not the perfect remedy because it can be over or under-compensatory in certain circumstances.[252] However, even in the rare circumstances when par acceleration is under-compensatory, corporate issuers still have economic incentives to avoid default because of reputational harm and cross-defaults that can occur from intentional breaches.[253] Thus, par acceleration is a more appropriate remedy than forcing the payment of the Make-Whole Premium.

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247. *See* Pfau, *supra* note 37.

248. *Id.*

249. William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 630 (1999).

250. E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1147–48 (1970).

251. *See Structure of Bondholder Remedies*, *supra* note 10, at 574–77; Indenture, *supra* note 50, § 6.02.

252. *See Structure of Bondholder Remedies*, *supra* note 10, at 575–77. The flaw of par acceleration can be especially evident in long-term bond indentures if market conditions change. *See id.* For example, if the bond price is below $1,000, then bondholders may be overcompensated in the event of a breach since, upon acceleration, they will receive $1,000 in principal plus the interest that has accrued even though the bond is trading below $1,000. *See id.* Also, if the bond is trading above $1,000, bondholders may be under-compensated if the bond issuer breaches since the acceleration would only return the bondholder $1,000 plus interest. *See id.*

253. *See Contracts of Inattention*, *supra* note 52, at 1120.

As discussed above, the Make-Whole Premium is always overcompensatory and almost always harmful to the bond issuer because the Make-Whole Premium is discounted at such a small discount rate causing the payment to be overcompensatory.[254] Acceleration better protects the expectancy interests of the bondholders and is more equitable in most circumstances.

C. Problems Arising from Cash America*: Increased Risk of Opportunistic Enforcement, Litigation, and Harm to the Bond Market as a Whole.*

One of the most troubling aspects of the *Cash America* ruling has been the response—or lack thereof—by bond issuers. The *Cash America* decision gave a remedy to bondholders that many practitioners never saw as available in the case of a breach of an indenture.[255] With a large number of law firms pushing for their clients to immediately change their indentures, or to be aware of the possible remedies if they accidentally breach,[256] one may have expected a swift change to many of these contracts. But it has been the opposite.[257] A few new bond issuers changed their indenture language to account for the *Cash America* ruling, but the changes were met with immediate backlash from investors.[258] Companies offering bonds should consider making swift changes because of: (1) the potential of increased risk of litigation from opportunistic enforcement; and (2) the potential of overall harm in the bond market.

1. The Increased Risk of Opportunistic Enforcement and Litigation

The biggest problem with the *Cash America* decision is the increased risk of opportunistic enforcement and thus increased risk of bondholder litigation. As discussed above, allowing bondholders to enforce the Make-Whole Premium provides them with an overcompensatory remedy.[259] This overcompensatory award increases the bondholders' incentive to try to enforce any possible event of default of the indenture.[260] This is the idea of opportunistic enforcement—the bondholder receives more benefit from a breach than if the bond issuer carries out the performance of the indenture.[261] Therefore, there is an increased incentive for the bondholders

254. *See supra* note 110 and accompanying text.

255. *See supra* Section II.B.

256. *See supra* note 229 and accompanying text.

257. *See Contracts of Inattention*, *supra* note 52, at 1116.

258. *See, e.g.*, Adam B. Cohen, Covenant Rev., The End of Covenants: The "No Premium on Default" Language Is Spreading Like Wildfire—Your Future Covenant Enforcement Is Being Destroyed 3–5 (2017), https://www.covenantreview.com/samples/download/34 [https://perma.cc/XQD3-7DY2] (discussing why bondholders should reject bonds that contain no premium on default language).

259. *See supra* Section II.B.

260. *See Structure of Bondholder Remedies*, *supra* note 10, at 575, 582–83.

261. *See id.*

to enforce any possible breach of the indenture since they would receive more benefit from a breach than from the actual performance.[262]

If opportunistic enforcement increases, so will bondholder litigation. Bondholders enforce their rights under indentures through litigation by claiming breach of contract.[263] Litigation is one of the largest costs for companies.[264] Bondholders (especially vulture funds) will likely begin many enforcement proceedings to try to collect expensive redemption premiums (similarly to the Make-Whole Premium in *Cash America*) or try to leverage companies into settling due to the high costs of the Make-Whole Premium and litigation.[265] This will increase the already expensive litigation costs for bond issuers and increase sham litigation.

2. Harm to the Bond Market as a Whole

Another significant danger from the *Cash America* decision is the potential harm it may cause to the bond market, including to both bond issuers and bondholders. The U.S. bond market is one of the largest capital markets in the world, largely consisting of corporate bonds.[266] The increased risks that can come from companies offering bonds may cause them to stop issuing bonds as frequently or even stop issuing bonds altogether. Corporate bonds are a great tool for investors and companies because they provide both parties with many benefits.[267] Companies may stop issuing bonds as a primary way to raise capital because it is not worth the risk of opportunistic enforcement, increased litigation, or paying a redemption premium. Companies will have to search for other sources of funding and lower the number of bonds available to investors. This harms bond investors, companies issuing bonds, and the bond market.

III. PROPOSAL FOR COMPANIES ISSUING BONDS NOW AND IN THE FUTURE

This Note proposes three solutions to fix the problems described in Part II. First, the court incorrectly decided *Cash America*, and the best way to fix the

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262. *See id.*

263. *See generally* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594 (S.D.N.Y. Sept. 19, 2016) (describing a case where the trustee sought judicial enforcement of a breach of an indenture); Sharon Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039 (2d Cir. 1982) (describing a case where the party sought remedies from a breach of contract claiming the bond issuer violated a covenant of the bond indenture).

264. John B. Henry, *Fortune 500: The Total Cost of Litigation Estimated at One-Third Profits*, CORP. COUNS. BUS. J. (Feb. 1, 2008), https://ccbjournal.com/articles/fortune-500-total-cost-litigation-estimated-one-third-profits [https://perma.cc/5DVF-EUDY] (estimating the annual overall cost for Fortune 500 corporations on litigation to be around $210 billion).

265. *Cf. Structure of Bondholder Remedies*, note 10, at 575, 582 (discussing possibilities of opportunistic enforcement).

266. *See* Shrout, *supra* note 20.

267. *See supra* Section I.A.

issue would be to overturn the case. Cash America did not appeal this case; therefore, a new case must be brought to overturn this faulty precedent. Cash America did not fulfill its requirements under the Federal Rules of Appellate Procedure to appeal the case. Next, this Note proposes that the bond issuers should draft language in their indentures to contract around the *Cash America* ruling. In theory, bond issuers can amend their current indentures to include this language pursuant to the amendment provisions in the bond indenture, but the language will be most effective if the issuer includes the language in the original drafting of the bond indenture. Lastly, moving forward, companies may maintain the same boilerplate language in their indentures but issue bonds at lower interest rates to help alleviate the risk of paying the redemption premium.

A. OVERTURN CASH AMERICA

The first and most obvious way to resolve an incorrect decision is by appealing the case and allowing a higher court to reverse the decision. Unfortunately, Cash America did not appeal the adverse decision to the U.S. Court of Appeals for the Second Circuit. Cash America originally filed for an appeal, but later removed its appeal in accordance with Rule 42 of Federal Rules of Appellate Procedure and closed any possibility of further appeal.[268]

It is hard to speculate why Cash America did not pursue an appeal of this case, but there are several possible reasons. First, appeals are expensive because of court costs and attorney fees.[269] It could be that Cash America found that the potential court costs and attorney fees for the appeal might be as much or more than paying the Make-Whole Premium. Second, it takes a long time to appeal—the average appeal time varies by court, but in some cases can take a year after notice of appeal for a decision to be rendered.[270] Cash America may have wanted to resolve the litigation and stop wasting time and energy on the lawsuit. The Southern District of New York's ruling came after both parties had filed cross-motions for summary judgment.[271] If the

268. *See* Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 16-3553, 2017 WL 4863104, at *1 (2d Cir. Jan. 5, 2017); *see also* FED. R. APP. P. 42 (describing the time requirements for appeals).

269. *See* C. ATHENA ROUSSOS & PEG CAREW TOLEDO, SHOULD I APPEAL THAT JUDGMENT? 2, https://athenaroussoslaw.com/yahoo_site_admin/assets/docs/Daily_Recorder_Column_1.344161651.pdf [https://perma.cc/F4UQ-9LF5].

270. U.S. CTS., U.S. COURTS OF APPEALS—MEDIAN TIME INTERVALS IN MONTHS FOR CIVIL AND CRIMINAL APPEALS TERMINATED ON THE MERITS, BY CIRCUIT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2020, at 1–2 (2020), https://www.uscourts.gov/sites/default/files/data_tables/jb_b4a_0930.2020.pdf [https://perma.cc/VW7Z-6WLV] (showing that the median appeal in the Second Circuit takes eleven months to be resolved on the merits).

271. Wilmington Sav. Fund Soc'y, FSB v. Cash Am. Int'l, Inc., No. 15-cv-5027, 2016 WL 5092594, at *3 (S.D.N.Y. Sept. 19, 2016).

appellate court would have reversed and remanded the judgment, this could have cost Cash America more time and money on remand.[272]

Since Cash America did not appeal, the only way to reverse this decision would be to bring a similar case in the Southern District of New York. This hypothetical case would have to have similar facts and include the same or very similar contractual language present in the *Cash America* Indenture. This would allow the court to look at the plain meaning of the contract, reevaluate the application of *Sharon Steel*, and correctly determine that bondholders cannot seek specific performance of optional redemption premiums as a remedy resulting from a breach of an indenture.[273] This hypothetical case is conjecture, but with an increase in opportunistic enforcement, the hope is that a similar situation will come in front of the court and be interpreted correctly.

B. CONTRACT AROUND THE CASH AMERICA *RULING*

Absent a judicial reversal, bond issuers can contract around the *Cash America* ruling. Indeed, the court hinted at this possibility in its opinion.[274] There are a few provisions that parties can add or change in the indenture to ensure that a bondholder cannot seek specific performance of the redemption premium. Parties can include an entirely new provision in the indenture that states that the bondholders are not entitled to specific performance of the redemption premium and that the redemption premium is not an available remedy as a result of an event of default.[275] Many law firms proposed these changes but these changes were followed by recoil from investors.[276] In particular, Covenant Review[277] attacked eighteen indentures with similar language to the above by calling the bonds tainted and urging investors not to purchase them.[278] In response, many indentures subsequently did not include this type of language.

In substitution of the above language, a bond issuer could include a provision in the indenture that requires bad faith conduct causing an event of default for a bondholder to seek specific performance of the make-whole

272. *See id.* at *3–8.

273. *See supra* Section II.A.

274. *Cash Am.*, 2016 WL 5092594, at *8 ("Cash America had—as future parties have—'the ability . . . to draft acceleration provisions that would be self-operative.'" (alteration in original) (quoting *In re* AMR Corp., 730 F.3d 88, 100 (2d Cir. 2013))).

275. Many law firms have proposed changing indentures. *See supra* note 229 and accompanying text. One law firm even included proposed language in its client alert. *See The Redemption 'Make Whole' Remedy Controversy*, *supra* note 208.

276. *See* COHEN, *supra* note 258, at 3–8 (urging bondholders to reject no premium on default language in recently issued bonds).

277. Covenant Review is a buy-side investors service founded by a former corporate finance attorney. *See Structure of Bondholder Remedies*, *supra* note 10, at 573; *see also* COHEN, *supra* note 258, at 1.

278. *See* COHEN, *supra* note 258, at 3–5.

premium. These provisions would be in line with the cases following *Sharon Steel*, which have interpreted that case to require bad faith conduct to collect the make-whole premium.[279] These provisions should include an unambiguous definition of bad faith conduct and list examples to give both parties a clear meaning of what is bad faith conduct sufficient to trigger specific performance. This would likely alleviate any objection by investors because it still contains the make-whole premium as a possible remedy but would also adequately protect the bond issuer from having to pay the make-whole premium in an accidental or good-faith event of default.

Additionally, parties could also tailor their contractual language to allow for the option to trigger the make-whole premium only in specific situations where it becomes valuable to the issuer, such as within the last year of the bonds or in the case of a business combination. Make-whole premiums are rarely used because they are so costly to the issuer. Most issuers only find it economically valuable to use the make-whole premium within the last few months of the bonds in order to refinance their debt, or in the case of a business combination at a large premium.[280] Thus, bond issuers can include language that specifically states that the make-whole premium can only be triggered within the last year of bonds or in the case of a business combination. With the benefit of the make-whole premium being minuscule, parties could also eliminate the provision completely. This may lead to opportunistic breaches of bond indentures by issuers in situations where interest rates sharply decline or where the company changes its structure, but it is hard to imagine that those breaches would be a serious issue when considering that the previous market remedy was only acceleration and a bond issuer's incentive to avoid reputational harm and cross-defaults.

These provisions could be easily added, removed, or changed to newly drafted indentures and would eliminate the possibility of the bondholder seeking the make-whole premium pursuant to the *Cash America* holding. It may be difficult for parties with existing bond indentures to contract around *Cash America* because indentures have specific requirements to amend their terms.[281] Amending a provision of the indenture will generally require the consent of the bondholders.[282] It is unlikely that the bondholders would consent to an amendment of the indenture that would hinder their availability to seek the make-whole premium without any other consideration. It is likely that companies with existing bond indentures will have to be extra careful to not cause an event of default that accidentally triggers the make-whole premium. Companies should make the above changes to their newly issued bond indentures moving forward.

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279. *See supra* Section II.A.

280. *Structure of Bondholder Remedies*, *supra* note 10, at 579–80.

281. *See* Indenture, *supra* note 50, §§ 9.01–.02.

282. *See id.* § 9.02(b)(8).

C. *Offsetting the Risk of Breach by Lowering Interest Rates*

This Note's final proposal is for bond issuers to keep the same boilerplate language but offset the risk of paying the make-whole premium by lowering the bond's interest rates. Lowering the interest rates of the bond allows the bond issuer to make smaller semiannual interest payments to the bondholders. These smaller semiannual payments will save the bond issuer money, which can compensate for the increased risk of opportunistic enforcement and the possibility of paying the make-whole premium. Lowering the interest rate may cause the bond to be less attractive on the bond market since the bondholders will receive smaller interest rate payments. However, the make-whole premium makes bonds less attractive for bond issuers. Lowering the interest rates allows the bondholders to keep the specific performance of the make-whole premium as a possible remedy and allows the bond issuer to compensate for the increased risk of paying the make-whole premium.

Presumably, in an efficient market, this may have already happened. Bond terms and interest rates work inversely to balance the risks and returns for bond issuers and bondholders.[283] If the terms of the indenture change such that there is increased protection for the bondholders at the detriment of issuers, in an efficient market, the issuers will adjust the interest rate to reflect that.[284] For example, if indenture terms are strict on the issuer, the bondholder will receive a lower return because the issuer will require smaller interest rates. Additionally, if the indenture terms are loose on the issuer, the bondholder will receive a higher return in the form of increased interest rates. If this change has occurred, this may explain the lack of adjustments in indentures since *Cash America*. Issuers and their counsel may value the interest rate adjustment more than they valued the cost of including the make-whole premium. It is hard to imagine that the ravenous vulture funds created a remedy that costs them more in interest rates than they gained in protection from the make-whole premium, but stranger things have happened.

Conclusion

The court's decision in *Cash America* shocked commenters and practitioners throughout the bond market. Most bond indentures in the bond market contain the same boilerplate language whereby the interpretation of one indenture can have lasting impacts on the market.[285] The interpretation of *Cash America* allowed bondholders to collect a new and overcompensatory remedy, the Make-Whole Premium.[286] This caused an immediate and adverse

283. *See* Moritz Hiemann, Covenants, Interest Rates, and the Cost of Debt 1–2 (2020), https://wwwo.gsb.columbia.edu/mygsb/faculty/research/pubfiles/26305/Debtcovenantsv7.pdf [https://perma.cc/Y39N-N4ZB].

284. *Id.*

285. *See Contracts of Inattention*, *supra* note 52, at 1115–16.

286. *See supra* Section I.B.2.

reaction from the corporate bar.[287] The court ignored the plain meaning of the indenture and improperly applied a precedent to come to its decision.[288] This decision will have implications for corporations issuing bonds in the future.

This Note proposes three solutions for bond issuers to remove the faulty *Cash America* precedent from applying to bond indentures.[289] First, a corporation can try to overturn the *Cash America* precedent. Second, a corporation can contract out of the *Cash America* ruling. Finally, a corporation can maintain the same language in its bond indenture but counterbalance the risk of paying the make-whole premium by lowering interest rates on bonds. If a bond issuer does not make any changes and maintains the same language, it is taking unreasonable risks and opening itself up to possible liability. As Warren Buffett once said, "[r]isk comes from not knowing what you're doing."[290] Corporations issuing bonds should know what they are doing and use these proposals to minimize or eliminate the risk of this unsound precedent applying to their corporate bond indentures.

287. *See supra* note 229 and accompanying text.

288. *See supra* Section II.A.

289. *See supra* Part III.

290. Benjamin Snyder, *7 Insights from Legendary Investor Warren Buffett*, CNBC MAKE IT (May 1, 2017, 6:01 PM), https://www.cnbc.com/2017/05/01/7-insights-from-legendary-investor-warren-buffett.html [https://perma.cc/9RT5-3HAH?view-mode=client-side&type=image].